

an attesting employer or of the ineligibility of an employer for the automated vessel exception, upon the earliest of the following events:

(1) Where the Administrator determines that there is a basis for a finding of violation by an attesting employer or a finding of nonapplicability of the automated vessel exception, and no timely request for hearing is made pursuant to § 655.630 of this part;

(2) Where, after a hearing, the administrative law judge issues a decision and order finding a violation by an attesting employer or finding inapplicable the automated vessel exception, and no timely petition for review to the Secretary is made pursuant to § 655.655 of this part; or

(3) Where a petition for review is taken from an administrative law judge's decision finding a violation or finding inapplicable the automated vessel exception, and the Secretary either declines within thirty days to entertain the appeal, pursuant to § 655.655(c) of this part, or the Secretary affirms the administrative law judge's determination; or

(4) Where the administrative law judge finds that there was no violation by an attesting employer or that the automated vessel exception does apply, and the Secretary, upon review, issues a decision pursuant to § 655.655 of this part, holding that a violation was committed by an attesting employer or holding that the automated vessel exception does not apply.

(c) The Attorney General, upon receipt of notification from the Administrator pursuant to paragraph (b) of this section:

(1) Shall not permit the vessels owned or chartered by the attesting employer to enter any port of the U.S. for a period of up to one year;

(2) Shall, in the case of an employer determined to be ineligible for the automated vessel exception, thereafter require that such employer not use alien crewmembers(s) to perform the longshore activity(ies) at the specified port or location in the State of Alaska without having on file with ETA an attestation pursuant to § 655.520 of this part; and

(3) Shall, in the event that the Administrator's notice constitutes a con-

clusive determination (pursuant to § 655.670) that the prevailing practice at a particular U.S. port does not permit the use of nonimmigrant alien crewmembers for particular longshore activity(ies), thereafter permit no employer to use alien crewmembers for the particular longshore activity(ies) at that port.

(d) ETA, upon receipt of the Administrator's notice pursuant to paragraph (b) of this section:

(1) Shall, in the case of an attesting employer, suspend the employer's attestation, either in whole or in part, for the port or location at issue and for any other U.S. port, and shall not accept for filing any attestation submitted by the employer for a period of 12 months or for a shorter period if such is specified for that employer by the Attorney General; and

(2) Shall, if the Administrator's notice constitutes a conclusive determination (pursuant to § 655.670) that the prevailing practice at a particular U.S. port does not permit the use of alien crewmembers for the longshore activity(ies), thereafter accept no attestation under the prevailing practice exception on Form ETA 9033 from any employer for the performance of the activity(ies) at that port, and shall invalidate any current attestation under the prevailing practice exception on Form ETA 9033 for any employer for the performance of the activity(ies) at that port.

**§ 655.670 Federal Register notice of determination of prevailing practice.**

(a) Pursuant to § 655.625(b), the Administrator shall publish in the FEDERAL REGISTER a notice of the Administrator's determination of any investigation regarding the prevailing practice for the use of alien crewmembers for particular longshore activity(ies) in a particular U.S. port (whether under an attestation or under the automated vessel exception). Where the Administrator has determined that the prevailing practice in that U.S. port does not permit such use of alien crewmembers, and no timely request for a hearing is filed pursuant to § 655.630, the Administrator's determination shall be the conclusive determination for purposes of the Act and subparts F

and G of this part; the Attorney General and ETA shall, upon notice from the Administrator, take the actions specified in § 655.665. Where the Administrator has determined that the prevailing practice in that U.S. port at the time of the investigation permits such use of alien crewmembers, the Administrator shall, in any subsequent investigation, give that determination appropriate weight, unless the determination is reversed in proceedings under § 655.630 or § 655.655.

(b) Where an interested party, pursuant to § 655.630, requests a hearing on the Administrator's determination, the Administrator shall, upon the issuance of the decision of the administrative law judge, publish in the FEDERAL REGISTER a notice of the judge's decision as to the prevailing practice for the longshore activity(ies) and U.S. port at issue, if the administrative law judge:

(1) Reversed the determination of the Administrator published in the FEDERAL REGISTER pursuant to paragraph (a) of this section; or

(2) Determines that the prevailing practice for the particular activity in the port does not permit the use of alien crewmembers.

(c) If the administrative law judge determines that the prevailing practice in that port does not permit such use of alien crewmembers, the judge's decision shall be the conclusive determination for purposes of the Act and subparts F and G of this part (unless and until reversed by the Secretary on discretionary review pursuant to § 655.655). The Attorney General and ETA shall upon notice from the Administrator, take the actions specified in § 655.665.

(d) In the event that the Secretary, upon discretionary review pursuant to § 655.655, issues a decision that reverses the administrative law judge on a matter on which the Administrator has published notices in the FEDERAL REGISTER pursuant to paragraphs (a) and (b) of this section, the Administrator shall publish in the FEDERAL REGISTER a notice of the Secretary's decision and shall notify the Attorney General and ETA.

(1) Where the Secretary reverses the administrative law judge and determines that, contrary to the judge's decision, the prevailing practice for the

longshore activity(ies) in the U.S. port at issue does not permit the use of alien crewmembers, the Secretary's decision shall be the conclusive determination for purposes of the Act and subparts F and G of this part. Upon notice from the Administrator, the Attorney General and ETA shall take the actions specified in § 655.665.

(2) Where the Secretary reverses the administrative law judge and determines that, contrary to the judge's decision, the use of alien crewmembers is permitted by the prevailing practice for the longshore activity(ies) in the U.S. port at issue, the judge's decision shall no longer have the conclusive effect specified in paragraph (b) of this section. Upon notice from the Administrator, the Attorney General and ETA shall cease the actions specified in § 655.665.

**§ 655.675 Non-applicability of the Equal Access to Justice Act.**

A proceeding under subpart G of this part is not subject to the Equal Access to Justice Act, as amended, 5 U.S.C. 504. In such a proceeding, the administrative law judge shall have no authority to award attorney fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act.

**Subpart H—Labor Condition Applications and Requirements for Employers Using Non-immigrants on H-1B Visas In Specialty Occupations and as Fashion Models**

SOURCE: 59 FR 65659, 65676, Dec. 20, 1994, unless otherwise noted.

**§ 655.700 What statutory provisions govern the employment of H-1B nonimmigrants and how do employers apply for an H-1B visa?**

(a) *Statutory provisions.* With respect to nonimmigrant workers entering the United States (U.S.) on H-1B visas, the Immigration and Nationality Act (INA), as amended, provides as follows:

(1) Establishes an annual ceiling (exclusive of spouses and children) on the number of foreign workers who may be issued H-1B visas—

(i) 195,000 in fiscal year 2001;